IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECND APPEAL NO. 281 of 1991

1. Shri Shankar R. Pore

2. Shri Uttam Ramchandra Pore ..Appellants

(Original defendants)

V/s

Shri Hanmant Digambar Pandit ..Respondent

(Original plaintiff)

Shri S.G.Page for Appelants

Shri R.S.Kate for Respondent

CORAM:S.R.SATHE,J.

DATED:31st Aug. 2004

ORAL JUDGMENT :-

1. Being agrieved by the judgment and order passed by the Court of the 4th Additional district Judge,Sangli in Regular Civil Appeal No.399 of 1983 whereby the judgment and order passed by the Court of Civil Judge,J.D., Tasgaon in Civil suit no.26 of 1978, decreeing the plaintiff’s suit for specific performance was confirmed and the appeal

was dismissed, the original defendants have preferred this appeal.

2. For the sake of convenience hereinafter parties shall be referred as plaintiff and defendants.

3. Brief facts giving rise to this appeal are as under :-

. The suit house described in para 1 of the plaint was initally owned by defendant nos.1 and 2. They agreed to sell the said property to plaintiff for Rs.25,000/- and executed Isar Pawati on 16-2-1989, after accepting the earnest amount of Rs.2,000/-. As per the stipulation in the said agreement, sale deed was to be executed on 16-4-1977, after accepting the balance amount. It is plaintiff’s case that after the execution of the said agreement again the defendants was in need of money. He therefore approached the plaintiff and plaintiff paid him Rs.500/- towards the said transaction. The defendant who were not in a position to execute the sale deed as they were to build a house in their property to have alternate accommodation wanted extension of time to execute the sale deed. The defendants

therefore made necessary endorsement in the original agreement dated 16-4-1977. Even thereafter the defendants did not execute the sale deed, hence plaintiff issued notice to the defendants and called upon them to execute the sale deed. In spite of receipt of notice the defendants neither replied to the notice nor executed the sale deed. Hence plaintiff filed the present suit for specific performance of the agreement to sell and alternatively also prayed for refund of earnest money. Defendants appeared and filed their written statement and resisted the suit claim. They agreed that document in question is signed by them. However, contended that they had never any intention to sell the suit property and document was got executed in respect of loan advanced by the defendant's father in the year 1976. The defendants also contended that there are other sharers in the suit property and as the same are not parties to the present suit the suit is bad for non joinder of necessary party. On these pleadings the trial court framed the issues. After considering the evidence adduced by both the parties the trial Court came to the conclusion that the plaintiffs have proved that the defendants agreed to sell the suit property and executed agreement to sell, also held that the

defendants were all along ready and willing to perform their part of the contract but defendants failed to execute the sale deed and as such the plaintiffs are entitled for specific performance. The trial Court also held that the suit is not bad for non joinder of necessary party.

4. Being aggrieved by the said order the defendants filed first appeal. However, the same also came to be dismissed. Hence the original defendants filed present second appeal. From perusal of the record, it appears that at the time of admission, this Court passed the following order on 11-7-1991.

> "Substantial question of law as framed in ground (d), (e) and (f)."

The said grounds read as under :-

> (d) Whether the courts below have committed grave error in law in omitting to consider some of the important submissions made on behalf of the defendants that (i) the suit of the plaintiff/respondent for specific performance is not tenable as the

documents is in the nature of security towards the loan taken by the defendants.

(e) Whether the courts below erred in holding that the suit property is the self acquired property of the defendants, when the said property is the joint family property of the defendants and the other members of the family?

(f) Whether the findings of the both the courts below that the documents dated 16-2-1977 exhibit 29 is of an agreement of sale executed by the defendants/appellants in favour of the respondent was in accordance with the law.

. In this Second appeal before me Shri S.G.Page, learned Advocate for the original defendants has urged only two points. Firstly he submitted that both the courts below have erred in holding that the suit transaction was of agreement to sell and not the transaction executed by way of security. Secondly, he canvassed before me that the other sharers of the suit property are not made parties to the present suit and as such suit is bad for non joinder of necessary parties. As against this

Shri Kate,learned Advocate for the Respondents supported the judgment and order passed by both the courts below.

5. From perusal of the record and particularly the deposition of the defendants, it is quite clear that admittedly the defendants have executed Issar Pavati, Exh.29. The only contention of the defendant is that the said document has been executed by way of security in respect of loan which was given by the plaintiff's father to the defendants in the year 1976. At the outset it must be mentioned that besides the bear word of the defendant, there is absolutely no other evidence on record to show that in the year 1976 such amount was given to the defendants and document in question that is Exh.29 has been executed by way of security for the said transaction. It is true that the plaintiff has examined one witness by name Vasant Pardeshi who has stated that once in his presence the defendant had taken an amount of Rs.2,000/- from plaintiff's father and for that purpose he had signed in the note book. However, curiously enough the defendant has not stated accordingly. So the evidence of this witness is also of no use to the defendant to prove that the transaction in

question was entered into by way of security in respect of the alleged loan given by the plaintiff's father to the defendants.

6. It is argued that though the agreement to sell was to be executed the document in question has been executed on plain paper and not on a stamp paper and as such it must be held that the tranaction was of loan. However, it has to be noted that there is no such statutory provision which says that such type of agreement ought to have been written and executed on a stamp paper. It is also argued that though it is shown that the document has been executed by Shankar and his brother Uttam in fact it was executed only by Shankar and signature of Uttam was obtained subsequently. The careful reading of Exh.29 will show that at various places in the document it is specifically mentioned that the agreement in question is executed by them and the sale deed will be executed by them thereby indicating that the agreement must have been executed by more than one person. So there is no sustenance in the contention taken by the defendant in this behalf. It was also tried to be argued that property in question was worth Rs.1,25,000/- in the year 1983 and it is difficult to believe that the defendant

would agree to sell such property for megre amount of rs.25,000/-. In short, the defendants want to contend that inadequacy of consideration is an important circumstances which would indicate that the transaction in question was not of sale but it was by way of security. However, it is pertinent to note that besides the bare word of the defendant there is no evidence worththe name to show that property in question is much more than Rs.25,000/- when the agreement to sell was executed on 16-4-1977. While considering this aspect it has to be mentioned that the property in question was in fact purchased by the defendants in the year 1963 only for Rs.5,500/- and thereafter in 1977 he has taken decision to sell the said property for Rs.25,000/-. So it cannot be said that the said consideration was grossly inadequate. Moreover it has also come on record that at the relevant time the defendant was in need of money. If it was so, then there was every possibility that the defendant must have agreed to sell the property at some lesser price than the market price. So looking to the case from that angle also the transaction was not of loan.

7. Relying on the subsequent endorsement by

virtue of which Rs.500/- were given to the defendant, it was contended that transaction was of loan. However, it has come in evidence of the plaintiff that when second endorsement was made the defendants had gone to the house of the plaintiff and at that time they were in need of money. Naturally question arises if it was so, why the defendants did not ask for the the balance amount of Rs. 23,000/- so as to execute the sale deed and on the contrary asked for extension of time. But the plaintiff has stated that because defendant wanted to construct a house in their land so as to make alternate provision they asked for extension. So merely because by virtue of this second endorsement extension was sought after accepting amount of Rs.500/-, one cannot jump to the conclusion that the transaction was of loan.

8. There is another important circumstance which also negatives the contention of the defendants. It is an admitted fact that the plaintiffs had issued notice to the defendant and called upon them to execute the sale deed. Admittedly the defendants had not given any reply to the said notice. They have come out with the case that after the receipt of notice they met plaintiff and plaintiff’s promised them that they would not take

any action if the amount is repaid within stipulated period. However, this statement of the defendant cannot be accepted. Any prudent person after receipt of the notice would not have merely relied on the bare submission of the plaintiff but would have asked writing to that effect but that has not happened in this case. This also shows that the transaction in question was not of loan and in fact the defendants had executed an agreement to sale. From perusal of the judgment of both the courts below it is very clear that both the courts have taken into consideration all the facts and circumstances and after appreciating the evidence have properly reached to the conclusion that the transaction was of agreement to sell and not by way of execution of loan and hence there is no necessity to interfere with the findings.

9. It is tried to be argued that the suit property is joint family property and as such other members of the joint family may joint as necessary party. However, if we peruse the CTS Extract of the suit property we find that name of only present defendants are shown as holders of the suit property so there is nothing on record to show that the property in question is in fact a

joint family property. Besides this admittedly the suit agreement is executed only by the present defendants of real brother of each other. Naturally plaintiff can file suit for specific performance only against hem with whom he had brevity of contract. If at all there are any complication in the suit property the present decree would obviously for not binding on them but that does not mean that the present suit is bad for non joinder of necessary parties. The finding recorded by the courts below in that behalf which was legal and correct.

10. In this view of the matter there is no substance in this appeal. The appeal is dismissed with costs.

(S.R.SATHE,J.)